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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 365

MISSOURI PACIFIC RAILROAD COMPANY,
PETITIONER,

VS.

SOPHIA DAVID, ADMINISTRATRIX OF THE ESTATE OF JAMES LEE DAVID, DECEASED, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

REVISED BRIEF FOR RESPONDENT.

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STATEMENT.

(Page references are to the Transcript.)

James Lee David was employed, about April 1, 1923, by the Missouri Pacific as a train rider, at a salary of $135.00 a month and expenses. It was admitted that at the time of his death he was engaged in interstate commerce (11). He was the husband of

the widow-administratrix, Sophia David, the plaintiff in this case. They had been married twenty-two years at the time he was killed, and were the parents of two children, aged eighteen and nineteen, respectively. At the time of the trial she was still a widow and was operating a power machine for the Kansas City Garment Co. (173-175).

The Special Agent's Department.

In the company's organization the work of protecting property owned by and in the company's care, was in a special department, under a chief special agent, located at St. Louis. Directly under him were two assistant chief special agents, one located at Kansas City, Mo., and the other at Little Rock, Ark., between whom the company's territory was divided. Under the two assistants there were in all sixteen divisional special agents, each of whom had direct charge of the work on his division. Within each division there was a further detailed organization of lesser ranking personnel.

R. S. Mitchell of St. Louis was chief special agent. W. H. Boult of Kansas City was assistant chief special agent, assigned to the western lines (12-13). C. M. Barber was divisional special agent at Kansas City (193).

The Train Riders.

The train riders in the railway service were part of this department (23). They were under the jurisdiction of the divisional special agent, by whom they were assigned to the trains of the company, not on

regular runs, but as and where needed (24). It was their duty to examine the seals on the car doors and see that they were intact, and that the train was all right, both before departure and en route (35). They also investigated damage suits and personal injuries (34). In a general way they were to protect the trains (23). For this purpose they were provided with flashlights (190).

There was no fixed rule about the number that would be assigned to a given train. That was a matter within the discretion of the local man. If men were available more than one rider would be sent with a train.

Nor was there any fixed rule about where they would ride on a train. That was left to the rider's judgment (37). On the occasion in question, for example, there were two train riders, the deceased and one Boyd. When Mr. David boarded the train he rode in the caboose. At the first stop, he went on up through the train to the engine and there rode into Leavenworth (188).

Mr. Boult testified:

"Q. Were any train riders instructed to go armed?

"A. We never instructed them at all, they was to protect the train.

"Q. You knew, did you not, as to whether or not they were going armed, or whether they were going unarmed?

"A. Apparently did.

"Q. Well, didn't you give them any instructions in that respect?

"A. We never gave them any instructions not to go armed.

"Q. Well, did you ever give them any instructions to go armed?

"A. I don't know that I ever did.

"Q. When they went armed who provided them with guns, pistols, or firearms?

"A. They had them themselves. We didn't, the Missouri Pacific didn't" (36).

Mr. L. Q. Moore, a night sergeant under the special agent at Kansas City (193), and the man who assigned Mr. David and Mr. Boyd to the fatal ride, described one of the serious complications in this case in this way:

"Q. Now, Mr. Moore, have you also served as train rider?

"A. Yes, sir; I have ridden a few trains—not very much.

"Q. As a matter of fact, there are frequently tramps found riding trains, aren't there?

"A. Yes, sir.

"Q. Men who are just bumming rides from different points to different points, aren't there?

"A. Yes; that is true.

"Q. And men who are not attempting to resort to robbery or crime of any kind—just trying to get a lift from one town to another? That is true, isn't it?

"A. *Well, you can't tell what a fellow is doing when he is riding a train*" (186).

The Bandit Gang.

For some time before Mr. David was employed, the company had been annoyed by an organized gang of thieves in and about Kansas City (16). Among some dozen members of the gang, Bert Gladson,

Lawrence Hayes, Nathan (Red) Loar and Hogy Ward were identified as participants (40). They were bad men, described by Mr. Boult as being:

> "The biggest bunch of thieves, and bank robbers and murderers (including) the man who had formerly shot our special agent, Fred Conklin, at Osawatomie" (56).

The divisional special agent, Mr. Barber, and Mr. Moore, the night sergeant, both said that this gang would shoot on sight (194, 183). Lawrence Hayes, one of the gang, testified that loaded guns were carried and that they were for use when occasion required; that the gang would shoot its way out of trouble, if trouble confronted it (163).

Naturally the gang diversified its activities and shifted its attack. "They don't rob any particular run, at different parts of the road" (Boult, 39). Robberies were mentioned at Leavenworth, Atchison, Stillwell, Osawatomie and Paola, in Kansas, and at Pleasant Hill and Raytown, Missouri (39-42). These affairs did not happen every night. "We were being robbed every week around Kansas City at this time" (26). At the time he was employed Mr. David was informed of this situation and told to be careful and watch out for himself (183, 194).

The Employment of McCarthy.

Mr. Mitchell, the chief special agent, became very much concerned about the company's losses from this source and resorted to the familiar and common weapon of espionage (16, 199). Through the Union Pacific's

chief special agent, Mr. Mitchell and one Harry McCarthy were brought together in the Baltimore Hotel at Kansas City, where McCarthy was hired. McCarthy was employed about April 5, 1923 (39).

Of McCarthy's employment, Mr. Mitchell testified:

> "I talked with McCarthy probably two or three hours, at which time he told me the history of the robberies committed by this gang; he told me at that time who was acting as head of the gang, who was furnishing the brains for these thieves, and he told me a great many details in connection with these robberies; he told me that he was trailing with the gang and he wanted to get away from them. *I arranged with him to keep us informed as to the activities of this gang, to give us advance information, if possible, when this gang planned to rob our trains,* and further arranged with him, in the event he could not get to us, couldn't give us advance information, to give us information then as to the fence where the stuff was taken, as well as who was in the robbery, and all the details possible. I arranged with him to pay him one hundred and fifty dollars a month for that sort of service, and then I called in my assistant, Mr. W. H. Boult, and I introduced Boult to McCarthy, and arranged with McCarthy his way of reporting to Mr. Boult, and left the matter in Mr. Boult's hands." * * *

Under the terms of his employment, McCarthy was to continue in his depredations with the gang, get advance information as to the time and place of their robberies, and notify petitioner thereof in advance, if possible to do so without being uncovered to his gang, and, if not possible, to notify them what disposition was made of the stolen goods.

Boult testified:

"Q. Well, now, did he tell you he had been robbing with these men, or that he merely knew them?

"A. I took it from his talk he had been with them.

"Q. Participating?

"A. Participating, yes, he didn't come right out and say it, but I took it from his talk.

* * * * * * *

"Q. Well, what was the plan and arrangement in respect to whether or not he was to go with this gang on their robberies, robbing expeditions?

"A. He was to continue the same as he did to get information, that is generally up to the man's own idea that is working.

* * * * * * *

"Q. What were the instructions given to McCarthy with respect to his going right along with the gang and at least pretending to participate in the robberies the same as the others?

"A. He was to continue as he was doing.

"Q. As he had been doing, you mean?

"A. Yes, sir; as he had been doing.

* * * * * * *

"Q. Now, after McCarthy was employed did he report for duty to you or to anybody else at any particular place each day or each week?

"A. At times he would call up on the 'phone when he wanted to give us any information (40, 41, 43).

"Q. He knew how to get hold of Mr. Boult?

"A. Yes, night and day service.

"Q. And where he could reach Mr. Boult at any time if he might want him?

"A. Yes, sir.

"Q. Did you know who the thieves were with whom he was supposed to be associating?

"A. He told me all of their names at that time.

"Q. Who were they?

"A. I don't remember all of them; one was named Loar, one was Gadshen—

"By Mr. Hackney: I think it is Gladsten; Hayes.

"By the Witness: Yes, Hayes; Loar, Gladsten; I don't know; there was a dozen of them (17-18).

"Q. The substance of your three hours' conversation amounts to this, then; That he was to continue to trail with these thieves, with whom he was acquainted, and was associating, to acquire any information he could possibly get about any anticipated robberies they were going to pull off, and to immediately inform you of those things?

"A. Yes (32)."

It had been the practice and custom among railroads to hire members of train robber gangs to tip off and frustrate robberies, and thus to assist in catching the gang (201).

McCarthy's Instructions About Reporting.

Mr. Boult, the assistant chief special agent, was thoroughly conversant with this arrangement.

"Q. Well, what was the plan and arrangement in respect to whether or not he was to go with this gang on their robberies, robbing expeditions?

"A. He was to continue the same as he did to get information, that is generally up to the man's own idea that is working.

"Q. Well, do you mean the plan was that he was to continue with this gang, Gladsen, Loar, Hayes and others?

"A. *His instructions were that he was to get us word before the robbery was committed, if he could, if not, to give us information as soon as he could after the robbery had been committed.*

"Q. Who was he to report this information to?
"A. Myself.
"Q. Did you advise him as to how to reach you *any time through the night or day?*
"A. *Through the telephone*" (41, 43).

The Protection Provided.

The purpose of these reports was obvious. Mr. Mitchell testified:

"Q. You say he was to make his reports to Mr. Boult?
"A. Yes, sir.
"Q. Or to someone that Mr. Boult might designate?
"A. That is it; I left him in Mr. Boult's lap.
"Q. That was to enable you to fortify yourselves against the expected robbery?
"A. Yes, that was to enable us to catch these thieves.
"Q. You expected, whenever you got notice from McCarthy that anything like that was to take place, to detail additional men on the train at that time, or wherever the robbery was to occur?
"A. No, it was taken care of in various ways; that was one of the ways?
"Q. What were other ways?
"A. Take an automobile and go out and intercept them" (22).

Apparently all the train riders, particularly those operating out of Kansas City, knew of McCarthy's employment and his activities in reporting in advance when and where the gang was to rob defendant's trains.

Mr. Boult graphically described what took place on one occasion a short time before David was killed,

when McCarthy reported an impending robbery. About five o'clock one evening McCarthy reported in person to Mr. Boult, in Kansas City, Missouri, that the gang was going to rob a train at Kenneth Tank in Kansas (according to the map, this is about twenty-five miles out of Kansas City).

"We immediately went there with the men to cover that place. * * * We immediately got our men, got help from Paola and covered this point all night.

"Q. Did you also notify the train riders on these respective trains to be on the lookout?

"A. Yes, sir.

"Q. Did you put on any extra train riders?

"A. That night we didn't. We didn't have them.

"Q. But you warned them all?

"A. We warned them all.

"Q. And in addition to that you had police officers covering the place where the robbery was expected to take place?

"A. Not that night" (44-45).

David reported at the office every morning (184).

McCarthy from the time of his employment until the time Mr. David was killed made other reports to Mr. Boult from time to time, not regularly, but apparently they were in touch with each other all of the time (43). Mr. Boult's best recollection was that McCarthy might have called him as late as the day before Mr. David was killed (48).

The Planning of the Fatal Robbery.

On May 16th, 1923, Hogy Ward, one of the gang, was being tried in the District Court of Wyandotte County, Kansas, for a payroll holdup. Certain of his

confederates were in attendance as spectators. This group included Bert Gladsen, Lawrence Hayes, George Riley and others, as well as McCarthy (62, 118).

Out in front of the court house during the noon hour they (including McCarthy) had a conversation about robbing box cars of the Missouri Pacific at Leavenworth that night. "We had intention of coming up and robbing box cars that night," and the plan was agreed upon (63-64).

"Q. To rob any particular train?

"A. Why, most generally they get the best merchandise there, about one-thirty in the morning" (76).

This was a train that carried cigarettes mostly and they were interested in cigarettes. It stopped at Leavenworth and it was at Leavenworth that they expected the robbery to take place (66, 120).

They discussed the expedition at different times, practically all afternoon. Lawrence Hayes testified that he first heard of it somewhere around two o'clock (118-119). They decided that right after the trial adjourned they would meet down at Riley's house, when and where they would make their arrangements, "try to get two cars to come up, some of the boys didn't want to come up" (Gladsen 63).

After court had adjourned that evening they all went down to Riley's house on South Coy Street in Armourdale. There they consulted, and Gladsen, Hayes, McCarthy and one Charles Masterson agreed to go. This was about six-thirty in the evening (66-67).

Mrs. Ada Riley, mother of George Riley, testified to this meeting. It occurred, she said, along in the evening, near supper time. She understood that Missouri Pacific box cars were their objective and Leavenworth the chosen place (170-172).

The Events of the Evening.

They left Riley's house about six-thirty or a quarter of seven and went to a restaurant to eat (121). Then McCarthy, Hayes and Masterson drove to the Federal Reserve Life Insurance Building, at Seventh and Armstrong in Kansas City, Kansas (a block south of Minnesota Avenue), where Masterson wanted to see a doctor. They stopped in front of the building somewhere near eight o'clock. McCarthy and Masterson got out, Hayes waited in the car. Masterson went up to the doctor's office and McCarthy went *alone* to a drug store on the northeast corner of Seventh and Minnesota one block and a wide street north of Hayes and the car (122-123).

Masterson came back from the doctor's office in five or six minutes, got in the car, sat down, lit a cigarette and announced that the doctor was out and that he was going to wait. Hayes then proposed that they go down to the drug store and get something to drink. They turned around, drove to Minnesota Avenue, parked the car, locked it, went over to the drug store and joined McCarthy (122-123). Hayes estimated that from the time McCarthy left the car in front of the doctor's office until they rejoined him at the drug store, some seven or eight minutes elapsed.

McCarthy was just looking around when they got there (124).

The three of them had a drink together and then Masterson went back to the doctor's office. McCarthy and Hayes drove to the foot of Minnesota Avenue (at Second Street) and watched a Missouri Pacific freight train go by (Hayes, 125). After that they drove back to Tenth and Minnesota, south on Tenth to Central Avenue, where they picked up Gladsen (125-126).

Wanting a fourth member of the party, they then drove to Nathan (Red) Loar's home, on South Fifth Street, in Armourdale. All the lights were out and McCarthy got out of the car, alone, went up on the porch and asked for Loar (68). Loar had been in bed and it took him ten or fifteen minutes to dress and come to the car (126).

They then drove to Ferry and Osage where McCarthy's sister lived, and McCarthy again got out of the car *alone* and went to the front porch to get some overalls and a jumper. This house sat back on an alley. They stopped the car on the street. McCarthy's errand that time took him some 60 yards away from the parked car (126, 127).

Then they drove to Gladsen's home, at 833 South 13th Street, where they picked up two guns and an iron bar to open box car doors with (127).

They then drove straight to Leavenworth (68). They left Kansas City, Kansas, somewhere around ten o'clock and got to Leavenworth about eleven-fifteen or twenty—a drive of a little over an hour. They

stopped at an old sugar refinery on a little creek bridge about half a block from the Missouri Pacific tracks, and waited for the train (128). "Oh, we must have waited about an hour or an hour and a half" (Gladsen, 69).

Mr. David's Train.

In the meantime, Train No. 173, a freight, was made up in the yards in the East Bottoms of Kansas City, Missouri. Its cargo was destined for points in Kansas and elsewhere (187, 38). It left Kansas City about ten o'clock (128).

On the night of May 16th, 1923, the train consisted of fifty-five or sixty cars. Mr. David probably boarded it at the A. C. Junction. He rode the caboose from Kansas City, Missouri, to Wolcott, Kansas, the first stop. There he left the caboose and went up through the train to the head end, and rode on the engine into South Leavenworth. The other train rider, Boyd, rode the caboose from Wolcott into Leavenworth. At South Leavenworth they took a siding to clear the track for a passenger train and stopped (188-189).

The Shooting of Mr. David.

When the train whistled at Leavenworth, McCarthy and Gladsen got out of the waiting bandit car and Hayes and Loar left. It was the plan that the former would break into the cars at South Leavenworth, get the stuff ready and throw it out at a particular crossing previously agreed upon in the north end of town, where the other two with the car would meet them and return with the loot to Kansas City (131).

McCarthy and Gladsen went over to the railroad track, hopped the train and rode on down in the yards to the place where the train stopped. They were both armed and McCarthy had the pinch-bar, the breaking tool (69-70).

The train had been on the passing track probably ten minutes when the fatal shooting occurred. Mr. Dougherty, the train conductor, and Mr. Boyd, the other night rider, left the caboose and proceeded forward between the main line and the passing track. Boyd was behind Dougherty. When they reached a point twenty-five to thirty car lengths from the engine, he heard two shots "pretty close together," fired about four or five car lengths ahead of where they were. Dougherty went to Mr. David and found him lying on the ground dead. He testified, "it appeared he was shot (in the chest somewhere) from someone standing up and ranged downward" (191). Mr. David fell between twenty and twenty-five cars lengths from the engine, where he had been when the train stopped, and on the same side of the train where Dougherty and Boyd were walking. Mr. Dougherty did not see Mr. David when he was shot, did not see the shooting and saw no gun-flashes. Mr. David had a revolver and sawed-off shot gun on him at that time (186-192).

The first information Mr. Boult had about the affair came to him after the killing. His night sergeant called him at his home in Kansas City, and he, the sergeant and two special agents drove to Leavenworth that night (50).

McCarthy's Reports.

The first report Boult had from McCarthy he received between seven and eight o'clock the next morning when one of his officers called Mr. Boult at Leavenworth on the telephone from Mr. Boult's office in Kansas City. McCarthy was at the office at the time and talked with Mr. Boult over the telephone. Later Boult talked with him in person. McCarthy gave him "all the information on who killed David, how it happened, and he went to Leavenworth with me to make the report to the county attorney" (Boult, 52).

The defendant developed on the cross examination of Lawrence Hayes that McCarthy testified in the trial of Bert Gladsen for the murder of Mr. David, where he was convicted and given a life sentence, and that McCarthy there testified that Gladsen was the man who shot David (140). Mr. Mitchell also testified:

> "Q. So after the killing of David, then McCarthy assisted in convicting these men that were responsible for Mr. David's death?
> "A. Testified against them, yes, sir.
> "Q. They were on trial over there in the Kansas court and Gladsen is the man shown to have shot David?
> "A. Was convicted of shooting David.
> "Q. And is serving a life sentence now?
> "A. And is serving a life sentence now.
> "Q. At Lansing, Kansas?
> "A. Yes, sir.
> By Mr. Hackney: That is all" (30).

McCarthy was continued in the service for some time. After he had testified, they got him a laborer's

job in the roundhouse or shops, and "I (Mr. Mitchell) kept him employed for some time * * * My instruction to Boult was to help McCarthy." Finally he left of his own accord (28-29).

McCarthy, however, did not testify at this trial.

Although the defendant had the knowledge of the intended robbery twelve hours in advance thereof, David and Boyd were not notified thereof.

"Q. Had any warning or information been given David or Boyd of this particular intended robbery at Leavenworth, Kansas?

"A. The night David was killed?

"Q. The night David was killed.

"A. I had no information that there was going to be one and there was no reason why we should give them one that night.

"Q. So, you didn't give—

"A. (interrupting) They had general instructions at all times.

"Q. I say, so you didn't give them any particular instructions that night?

"A. I didn't have any information" (Boult, 59).

POINTS, AUTHORITIES AND ARGUMENT.

I.

David Did Not Assume the Risk of the Particular Robbery Resulting in His Death.

While David undoubtedly assumed the ordinary risks incident to his employment as a train rider, as well as the risks which were extraordinary but open, obvious, or known to him, yet he did not assume special and extraordinary risks not known or appreciated by him, but which were known by the petitioner and concerning which the petitioner by ordinary care could and should have warned him.

Chesapeake & Ohio Railway Co. v. *De Atley*, 241 U. S. 310, 36 Sup. Ct. Rep. 564.

Chicago & Northwestern Ry. Co. v. *Bower*, 241 U. S. 470, 36 Sup. Ct. Rep. 624, l. c. 626.

Chesapeake & Ohio Ry. Co. v. *Proffitt*, 241 U. S. 462, 36 Sup. Ct. Rep. 620, l. c. 622.

Gila Valley C. & N. R. Co. v. *Hall*, 232 U. S. 94, 34 Sup. Ct. Rep. 229.

Chicago R. I. & P. Ry. Co. v. *Ward*, 252 U. S. 18, 40 Sup. Ct. Rep. 275.

Reed v. *Director Gen'l of Rlds.*, 258 U. S. 92, 42 Sup. Ct. Rep. 191.

Erie Ry. Co. v. *Purucker*, 244 U. S. 320, l. c. 324, 325.

Berry, Adm. v. *St. Louis, San Francisco Ry. Co.*, 26 S. W. (2nd) 988, l. c. 994, Certiorari denied 281 U. S. 765, 50 Sup. Ct. Rep. 464.

Hough v. *Railroad*, 100 U. S. 213, 217.

Pantzar v. *Mining Co.*, 99 N. Y. 368, 376.
Labatt's Master and Servant, 2nd Ed., Sec. 1178, and cases cited in notes.

David was employed by petitioner on April 1, 1923, as a train rider working out of petitioner's Kansas City office under the supervision of Boult and Barber. The duties of his employment were various. He was required to inspect petitioner's trains and other property not only in the yards but also when assigned to that work was to go with the train, and wherever the train stopped it was his duty to go through the train or to get off and walk alongside the train and inspect it, particularly the seals on the car doors, to make sure that they had not been tampered with, and to guard and protect the property in transit. For this purpose he sometimes rode in the caboose and sometimes on the engine or at any other place on the train, as his judgment dictated (35). Other duties of train riders were to investigate damage suits against the railroad and robberies that had been perpetrated (34).

In his work of protecting and guarding the railroad's properties in the yards and in transit he might encounter thieves, burglars, robbers, or tramps attempting merely to steal a ride on the petitioner's trains (186).

At the time of his employment he was advised of the robberies and depredations of a particular gang which had been operating at irregular times and at widely divergent points on petitioner's various lines, and was told that he might encounter that gang at any

time or place. At the time of his employment on April 1, no means or method had been adopted by petitioner for ascertaining in advance the operations of this gang, so that at that time the only warning the petitioner could give David was that he was likely to encounter this gang at any time or place and that he should be on the lookout for that gang.

However, thereafter, on the fifth day of April, 1923, petitioner employed one McCarthy, a member of this gang, with instructions to work under cover and cooperate with petitioner's inspection department and assist petitioner to trap the members of the gang in order that they might be brought to justice and their depredations upon petitioner's property stopped (39). McCarthy was hired to work secretly so far as the other members of the gang were concerned and instructed to trail along with this gang and ascertain from them in advance when and where the gang was to rob petitioner's trains, and then to notify petitioner of said time and place so that petitioner might be prepared by concentrating its train riders as well as the police and other peace officers and be thereby enabled to surprise and capture the members of the gang. McCarthy was further to notify petitioner where the gang disposed of property stolen from petitioner. McCarthy was employed by the month for this purpose and paid a wage of $150.00 per month therefor. It was his duty to report to petitioner's assistant chief special agent, Mr. Boult, at the Kansas City office from time to time of the operations of this gang, and arrangement was made whereby Mr. Boult

could be reached by telephone at any time, day or night, for the purpose of making his reports and particularly for the purpose of advising Boult of the time and place of an intended robbery by this gang, and it was made the duty of McCarthy to ascertain such intended robberies and to report the same to Mr. Boult in advance, if it was possible for him to do so without uncovering to the members of the gang his duplicity.

A short time before David was killed, McCarthy reported to petitioner's inspection department an intended robbery which the gang had planned of one of petitioner's trains at Kenneth Tank, Kansas. Accordingly, the train riders were advised of this report and they and police officers went to Kenneth Tank prepared to capture the gang when they attacked the train at the appointed time and place. However, in some way the plans of the gang miscarried and no robbery was attempted on that occasion (44). David reported at the inspection office in Kansas City every day. It is a fair inference from this testimony that David was aware of McCarthy's employment and of the method which petitioner had adopted of ascertaining in advance and reporting to the train riders the time and place of the attacks and depredations of this particular gang of train robbers. There is testimony that only Inspector Mitchell and Assistant Inspector Boult knew of McCarthy's employment. However, Barber, who was the immediate superior of David and the other train riders operating out of Kansas City, admitted that he knew all about the employment

of McCarthy long before David's death, as well as the duties to be performed by McCarthy (200).

It is therefore fair to assume from the above facts and circumstances that whatever the situation may have been at the time David was employed, that at the time of the robbery perpetrated by this gang resulting in David's death, that David knew of McCarthy's employment and activities, and of the method which petitioner's inspection department had subsequently inaugurated, through which he and other train riders would be warned and notified concerning the time and place of the attacks and depredations of this particular gang of train robbers. Accordingly, he had a right to rely upon this method of giving advance warning, and it is reasonable to infer that he did rely thereon.

Under this testimony, McCarthy and members of this particular gang at noon on May 16, planned the robbery of petitioner's train to take place at Leavenworth, Kansas, to take place after midnight the following morning. The jury found on ample evidence that McCarthy within the period of 12 or 13 hours intervening, could reasonably have reported the time and place of this planned robbery to petitioner's inspection department without danger of uncovering himself to the train robbers, and that he was negligent in not doing so (204-206). As a result the train robbers surprised David and other employes of the train and shot and killed David from ambush at a time and place when David and other employees on the train were not suspecting an attack, and without opportunity

to protect themselves and at a time when he was walking alongside his train inspecting the seals and performing the duties of his employment. He was shot from above and the other employees did not see the assassin or the flash from his revolver, indicating that the killer had concealed himself between two cars of the train and while standing on the coupling, or sill of one of the cars, shot David the moment he came into view while walking alongside the train performing his duties as aforesaid.

It would seem clear from the above facts that this sudden and unexpected attack by the gang of train robbers amounted to an extraordinary and special peril or danger resulting from the negligence of David's coemployee, McCarthy, and hence chargeable to the petitioner under the Federal Employers' Liability Act, and not one of the ordinary risks incident to his employment. It was not obvious or open, but an ambushed attack. Petitioner concedes that this particular peril was not known or anticipated by David. If David knew of the method petitioner had adopted for his and his fellow train riders' safety, and it would seem that he must have from what had theretofore transpired, he had a right to rely upon the performance of McCarthy's duty to furnish advance information of the time and place of the attack by this particular gang of robbers in order that he might be prepared to cope with them at least on equal terms. If this duty had been performed, David and his fellow train rider, Boyd, and perhaps others, would have been afforded the opportunity of capturing Gladsen, the

assassin, when the latter and McCarthy first boarded the train. At least, David could have avoided exposing himself to being shot, as he so unsuspectingly did expose himself.

As we view the situation, it is immaterial whether or not David knew of the petitioner's employment of McCarthy to furnish advance information concerning the depredations of this gang. The doctrine of assumption of risk, particularly as to dangers that are not open and obvious, rests upon the assumption that the servant has an equal opportunity with his master to know or ascertain the particular risk assumed by him. Hence, the doctrine does not apply where the master or someone for whom the master is responsible knows of a particular hazard or risk not known to the servant. The duty of the master to his servant is constant and continuing to use ordinary care to make and keep his place of work safe and to minimize the hazards connected therewith. Good faith requires that the master warn the servant of any extraordinary or special hazard known by the master and unknown to the servant, and where there is no parity of knowledge of such danger, such risk is not assumed by the servant, as shown by the above cases of this court and other courts.

There is no analogy between the facts of this case and those in the case of *St. Louis-San Francisco R. R.* v. *Mills*, 271 U. S. 344, cited and relied upon by petitioner. In that case the master, during a strike, had one of its guards accompany the plaintiff home from his work and while on his way home he was attacked

by strikers. This court rightly held in that case that the master owed no duty to the servant after his day's work had been completed and he had left the master's premises, and that because the master performed the gratuitous service of having a guard accompany him home could not be held liable for failing to do more. David was killed in the performance of his duties for petitioner. The petitioner owed him a continuing duty to use ordinary care at all times for his safety, and recognizing that duty, had inaugurated a method or system which, if the employee charged with operating that system or method had performed his duty, would have prevented David's untimely death. The institution of this method or system by petitioner was not gratuitous in any sense of the word. McCarthy had as important a duty to perform as did David and other train riders. The end sought to be accomplished by the employment of each was the same. The train riders worked openly in the inspection and protection of petitioner's property and the property belonging to the public being carried by petitioner's trains. McCarthy was working in the same department under cover with the end and purpose of apprehending and bringing to justice the members of this gang of train robbers and at the same time so anticipating their depredations as to protect the train riders and other employees of petitioner from the dangers of being surprised and shot by this gang. Hence, the petitioner in employing McCarthy, was performing a service and duty which it owed not only to its stockholders and creditors, but to shippers using its lines for the trans-

portation of freight, and to the public generally. Why, then, was David not entitled to the protection and benefits which ought to have accrued to him through the inauguration of the method in question, which, if McCarthy had performed the duty imposed upon him, would have resulted in his being timely warned of the particular hazard which, at an unguarded and unsuspecting moment, swept him to his death?

In discussing extraordinary and special risks of the above nature, this court in *Chesapeake & Ohio Ry. Co.* v. *DeAtley*, 36 Sup. Ct. Rep. 564, l. c. 566, said:

> "According to our decisions, the settled rule is not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them."

Also in the case of *Chesapeake & Ohio Ry. Co.* v. *Proffitt*, 36 Sup. Ct. Rep. 620, l. c. 622, this court announced the following applicable rule:

> "And, as has been laid down in repeated decisions of this court, while an employee assumes the risks and dangers ordinarily incident to the employment in which he voluntarily engages, so far as these are not attributable to the negligence of the employer or of those for whose conduct the employer is responsible, the employee has a right

> to assume that the employer has exercised proper care with respect to providing a reasonably safe place of work (and this includes care in establishing a reasonably safe system or method of work), and is not to be treated as assuming a risk that is attributable to the employer's negligence until he becomes aware of it, or it is so plainly observable that he must be presumed to have known of it. The employee is not obliged to exercise care to discover dangers not ordinarily incident to the employment, but which result from the employer's negligence. *Texas & P. R. Co.* v. *Archibald,* 170 U. S. 665, 671, 672, 42 L. ed. 1188, 1191, 18 Sup. Ct. Rep. 777, 4 Am. Neg. Rep. 746; *Choctaw, O. & G. R. Co.* v. *McDade,* 191 U. S. 64, 68, 48 L. ed. 96, 100, 24 Am. Neg. Rep. 24, 15 Am. Neg. Rep. 230; *Texas & P. R. Co.* v. *Harvey,* 228 U. S. 319, 321, 57 L. ed. 852, 855, 33 Sup. Ct. Rep. 518; *Gila Valley, G. & N. R. Co.* v. *Hall,* 232 U. S. 94, 101, 58 L. ed. 521, 524, 34 Sup. Ct. Rep. 229; *Seaboard Air Line R. Co.* v. *Horton,* 233 U. S. 492, 504, 58 L. ed. 1062, 1070, L. R. A. 1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834."

This court laid down a similar rule as to extraordinary and special hazards in the case of *Chicago & Northwestern Ry. Co.* v. *Bower,* 36 Sup. Ct. Rep. 624, l. c. 626, as follows:

> "In short, while he knew there were certain dangers naturally incident to the use of tubular glasses upon the lubricator, there is nothing to show that he knew or had any ground to believe that his employer had been wanting in the exercise of proper care for his safety, or that because of such want of care the danger to him was greater than it ought to have been. Without this, he could not be held to have assumed the increased risk" (citing cases).

The case just quoted from is authority for our contention that it is immaterial whether or not David knew of the method or system inaugurated by the petitioner, after his employment, by which David should have been warned of the particular hazard which took his life.

Under the Federal Employers' Liability Act, an employee or his dependents may not only recover against his employer because of the negligent act of a fellow servant, or any other employee of his master, but the negligence of such other employee may also create a risk which the injured employee does not assume. This court in *Reed* v. *Director Gen'l of Railroads,* 42 Sup. Ct. Rep. 191, l. c. 192, quoted from *Chicago, Rock Island & Pacific R. R. Co.* v. *Ward,* 252 U. S. 18, 40 Sup. Ct. Rep. 274, as follows:

> " 'The Federal Employers' Liability Act places a coemployee's negligence, when the ground of the action, in the same relation as that of the employer as regards assumption of risk.' "

It is therefore plain that David did not assume the negligent breach of duty of McCarthy in failing and omitting to furnish to petitioner's inspection department definite knowledge possessed by him which in turn would have been transmitted to David and prevented his assassination.

The hazards and risks of any given occupation fall within four classes: (1) those known by both parties; (2) those known by either party; (3) those known by the servant and not by the master; and (4) those known by the master and not known by the

servant. While the servant may be said to assume those risks falling within the first three classifications, it would be a complete perversion of the whole doctrine of assumed risk to say that it applies to any case falling within the fourth classification. At the time of David's employment, the risk which caused his death might be said to be one known by neither party, and on the theory that David had an equal opportunity with petitioner to discover the risk, he might be said to assume it as a part of the duties of his employment. But when the petitioner, five days later, inaugurated a system and method by which it could ascertain and did ascertain in advance the time and place of the risk constituting the special and extraordinary hazard, such hazard then became one resulting from the negligence of petitioner, because it was within the petitioner's power to obviate the risk and danger by giving a timely warning thereof to David.

Assumption of the risk is an affirmative defense, and the burden was on the defendant to establish that David assumed the risk resulting in his death. It was not necessary that the plaintiff anticipate such defense in her petition or disprove it by the testimony. If, under all the evidence, it appears that for any reason David did not assume the particular risk causing his death, then the court ought not to say that he did assume it. Concerning the employment of McCarthy, Boult testified:

> "Q. Well, now, did he tell you he had been robbing with these men, or that he merely knew them?

"A. I took it from his talk he had been with them.

"Q. Participating?

"A. Participating, yes, he didn't come right out and say it, but I took it from his talk.

* * * * * * *

"Q. Well, what was the plan and arrangement in respect to whether or not he was to go with this gang on their robberies, robbing expeditions?

"A. He was to continue the same as he did to get information, that is generally up to the man's own idea that is working.

* * * * * * *

"Q. What were the instructions given to McCarthy with respect to his going right along with the gang and at least pretending to participate in the robberies the same as the others?

"A. He was to continue as he was doing.

"Q. As he had been doing, you mean?

"A. Yes, sir; as he had been doing."

The testimony is without contradiction that McCarthy, pursuant to this understanding and arrangement with petitioner, participated in the plan to rob petitioner's train. McCarthy, Gladsen, Loar and Hayes, and perhaps other members of this gang, planned, confederated and conspired, to go to attack petitioner's train at Leavenworth. They went to Leavenworth with that purpose. Petitioner's employee, McCarthy, accompanied Gladsen when they boarded David's train, and was present when Gladsen fired the shots that killed David. Because of the conspiracy, Hayes and Loar, who were not present at the killing, were convicted along with Gladsen and sent to the Kansas penitentiary for the killing of David. Accordingly, the act of Gladsen in killing David was

the act of McCarthy as well as the act of the other two confederates. Therefore, McCarthy was liable both criminally and civilly for David's death. In short, David's death resulted from the act of one of petitioner's employees. Quite aside from petitioner's duty to notify David of the intention of the gang to rob its train at the time and place in question, McCarthy owed an independent duty, and the petitioner, through McCarthy, owed an independent duty to David to warn him of what was about to happen, and to frustrate Gladsen, or to take some measure which would have prevented Gladsen from shooting David. While this negligence was not alleged in plaintiff's petition and plaintiff had no right to recover on the basis of such negligence, yet this testimony thoroughly demonstrates the inapplicability of the defense of assumed risk under the facts presented by this record. It comes with poor grace indeed for the petitioner to say that David assumed the risk of being killed by the act of one of petitioner's own employees.

Moreover, petitioner's employment of McCarthy, and the terms thereof, contemplated, as shown from the above testimony, that McCarthy would continue on his robbing expeditions with the gang, so that by the terms of his employment, it was contemplated that he do just what he did in this case. Petitioner should have foreseen that some of these depredations by McCarthy and the gang might have occurred without advance notice to the petitioner and in consequence thereof that its train riders might be surprised and injured or

killed by members of the gang; or that McCarthy himself, likewise an employee of the petitioner, might be killed by one of its train riders if the train riders were not notified and fully warned in respect to McCarthy's employment. Now it is petitioner's position that David was not told about the employment of McCarthy and what he was doing. If McCarthy's employment was kept secret from the train riders as claimed by petitioner, such fact alone would be sufficient to *increase* and *create* hazards both for the train riders and for McCarthy which had not theretofore existed. Moreover, if David and the other employees had been warned thereof and knew who McCarthy was and what he was doing, McCarthy might be able to disclose himself at the time of the robbery to the train riders, without suspicion of his confederates, so as to put them on their guard rather than to allow them to expose themselves to almost certain death, and this he could do, even though he had failed to supply the inspection department with advance information of the time and place of the depredation. Accordingly, if David did not know of McCarthy's employment as claimed by petitioner, petitioner was doubly negligent in failing to advise David of such employment and in providing some means whereby the train riders might be apprised during the robbery of McCarthy's presence and of the robbery that was impending.

The above considerations serve to accentuate the special and extraordinary nature of the risks and dangers attending the staging of this robbery by McCarthy and his confederates, and to illustrate more

clearly the inapplicability of the doctrine of assumed risk. That venerable doctrine may not be used by petitioner as a cloak to protect it from the results of so nefarious an undertaking as that planned and executed by its employee, McCarthy, with petitioner's sanction which could be calculated only to result in the death, either of one of petitioner's train riders, or in the death of McCarthy, or perhaps both.

II.

Petitioner Was Guilty of Actionable Negligence Directly and Proximately Causing David's Death.

Petitioner's negligence was submitted to the jury under Instruction 1 (204). By that instruction the jury was told that if it found from the evidence that petitioner had employed one McCarthy as an informant to ascertain and report to petitioner the operations of certain persons who planned and intended to rob petitioner's train and that the said McCarthy ascertained and knew on the 16th day of May, 1923, that said persons intended to rob the train on which David was riding at Leavenworth, Kansas, on the early morning of May 17, and that after learning of such robbery, he could by the exercise of ordinary care and with safety to himself, have notified the petitioner and that the petitioner could thereafter have warned David, but that McCarthy negligently and carelessly failed to report said information and that persons at said appointed time and place attempted to rob said train, and that one of their number killed David, and

that the negligence of the said McCarthy in failing to report said intended robbery directly caused the said David's death, that plaintiff was entitled to recover against petitioner.

Said instruction was amply supported by the testimony as may be seen by a most casual reading of the record, and as more particularly set forth in respondent's statement herein. It was shown that McCarthy knew of the time and place of this robbery some 12 or 13 hours in advance thereof, and that for 10 hours he was within the populous district of Kansas City, Kansas, a city of 100,000 inhabitants, where he might have had access to a telephone at all times; that at various times he was entirely alone and out of sight of all other members of the gang; that arrangements had been made for him to reach Inspector Boult by telephone at any time during the day or night. Moreover, on one pretext or another, he might have absented himself from the other members of the gang at other times and communicated this knowledge to petitioner's inspection department.

Also it was shown that David had no advance information of this particular robbery; that he was walking along in the open alongside the train inspecting the seals, entirely exposed, and that while in this position, without the slightest knowledge or intimation of any danger or any immediate danger, he was shot down from ambush without any opportunity whatever to protect himself or to use such weapons as he had on his person, and without an opportunity to take ref-

uge or be able to cope with the robbers on anything like equal terms.

Moreover, it was definitely shown that he was killed by a member of this very gang and in the presence of employee McCarthy, and that said member and other members of the gang were convicted of his murder and sent to the Kansas penitentiary.

In short, negligence of the most flagrant variety was proved, and it was shown definitely that his death was the sole and unquestioned result of such negligence. That under this evidence petitioner was negligent in failing to warn David is amply sustained in the following cases:

Peters v. *George,* (C. C. A. 3d Cir.) 154 Fed. 634.

M'Calman v. *Illinois Cent. Ry. Co.,* (C. C. A. 6th Cir.) 215 Fed. 465.

Co-operant Tel. Co. v. *St. Clair,* (C. C. A. 2nd Cir. 1909) 168 Fed. 645.

Cincinnati N. O. & T. P. Ry. Co. v. *Hall,* 243 Fed. 76, 80, 81, 82, (2).

Baxter v. *Roberts,* 44 Cal. 187, 13 Am. Rept. 160.

Holzhauser v. *Denver Elec. Co.,* 18 Col. App. 431, 72 Pac. 289.

Perry v. *Marsh,* 25 Ala. 659.

For the convenience of the court, we are printing as an appendix in the back of this brief, respondent's brief and argument dealing with the various points raised on this writ which were contained in respondent's brief before the Supreme Court of Missouri in this cause.

III.

McCarthy Was the Employee and Servant of Petitioner and Petitioner Cannot Now Be Heard to Say That He Was An Independent Contractor.

Petitioner with little apparent confidence in its position now asserts that McCarthy was not its employee or servant at all, but was an independent contractor.

In the first place, the petitioner cannot be heard now to assert that McCarthy was not an employee. No such contention was made during the trial of the cause. On the contrary, petitioner conceded at the trial that McCarthy was its employee, and such was a part of its trial theory. Petitioner requested the court to give, and the court gave, instruction 4, on its behalf, as follows:

> "Even though the jury may find from the evidence that the defendant's officers and agents *employed one McCarthy* as an informer on car thieves and train robbers, and that prior to and at the time of such *employment* they knew that said McCarthy was a car thief, train robber, convict or ex-convict, *yet such employment by them of McCarthy* as such informer was not unlawful; and the defendant is not *by reason of such employment* liable for the act of McCarthy in accompanying Gladson and others in an attempt to rob the train on which David was train rider, nor for the act of said McCarthy in being present at the time and place of the fatal *shooting* by Gladson of said David."

Moreover, on the appeal of this cause to the Supreme Court of Missouri, petitioner assigned no error

of the trial court in submitting said cause to the jury on the basis that McCarthy was its employee and servant, and it will be noted by this court that the Supreme Court of Missouri in its opinion does not discuss this matter. On the contrary, the Supreme Court of Missouri in its opinion quotes from petitioner's brief as follows:

> "'It was admitted that David, when killed, was in the line of his duty, that his work was interstate commerce, and no question was raised as to the plaintiff being the administratrix of his estate. *The sole question presented in the trial court and pressed here is whether or not any negligence of the defendant was shown and if so, whether it was the proximate cause of David's death'* (Appellant's Brief)" (220).

It was not until petitioner filed its motion for a rehearing in the Supreme Court of Missouri that it even mentioned or suggested that McCarthy was not its employee.

Accordingly, the trial court and Supreme Court of Missouri will not be convicted of error concerning a matter on which they in a proper manner were not asked to pass and this question is not now open for review in this court.

> *Willoughby* v. *Chicago,* 235 U. S. 45, 35 Sup. Ct. Rep. 23.
>
> *Wall* v. *Chesapeake & O. Ry. Co.*, 256 U. S. 125; 41 Sup. Ct. Rep. 402.

Moreover, the testimony at the trial was full, ample and complete that McCarthy was an employee of petitioner. Mr. Boult testified:

"Q. What was the purpose of meeting McCarthy there at that time?

"A. Why he and Mr. Mitchell had been talking over different robberies that had happened on the road and we were figuring on *employing McCarthy*, I think, at that time.

"Q. Well, was McCarthy *employed* there on that date?

"A. He was" (39).

* * * * * * *

"Q. What salary did the company undertake to pay him, or wage?

"A. Well, it is one hundred and fifty dollars a month, at that rate, at the rate of one hundred and fifty dollars a month.

"Q. How frequently was he to be paid?

"A. Every month.

"Q. By the month?

"A. Well, yes, by the month, and if he wanted money, we would give it to him" (41).

* * * * * * *

"Q. Well, do you mean the plan was that he was to continue with this gang, Gladston, Loar, Hayes and others?

"A. His instructions were that he was to get us word before the robbery was committed, if he could, if not, to give us information as soon as he could after the robbery had been committed.

"Q. Who was he to report this information to?

"A. Myself.

"Q. Did you advise him as to how to reach you any time through the night or day?

"A. Through the telephone" (41).

* * * * * * *

"Q. Now, after McCarthy was *employed* did he report for duty to you or to anybody else at any particular place each day or week?

"A. At times he would call up on the 'phone when he wanted to give us any information" (43).

"Q. How long did McCarthy continue in the *employment of the railroad company* under your department?

"Mr. Hackney: As an informer?

"Q. Yes, as an informer.

"A. As an informer, well, I think until about June, 1923" (46).

Relating to how petitioner paid the wages of McCarthy, and train riders, and others in the inspection department, Boult testified:

"Q. How would the cash be transmitted to you?

"A. The cash would come to me in Mr. Mitchell's personal check for him (McCarthy) and the other men, made payable to W. H. Boult.

"Q. Did you pay all your informers in that manner by paying them cash?

"A. *I paid all men employed under me in that line of duty by cash*" (47).

* * * * * * *

"Q. Did you take any receipts from those men?

"A. Certainly, I did, I would protect myself.

"Q. You took a receipt from McCarthy?

"A. I did.

"Q. What did you do with those receipts?

"A. I sent them in to St. Louis to cover that check.

"Q. To show the disbursement you made?

"A. Yes, sir" (47).

* * * * * * *

Mr. Mitchell testified:

"Q. Was he (McCarthy) ever *employed as an employee of the railroad company at all*, by you or by anyone working under you?

"A. Yes.

"Q. Who *employed* him?

"A. I did.

"Q. And when did you *employ* him?

"A. Oh, in April, 1923, I think it was.

"Q. Do you know about the time; was it the 3rd or 5th—

"A. I think it was the 5th" (15, 16).

* * * * * * *

"Q. Where was he *employed?*

"A. Kansas City" (16).

* * * * * * *

"Q. And in what capacity did you *employ* him?

"A. As McCarthy; he was a thief at that time.

"Q. You didn't *employ* him for that purpose?

"A. I *employed* him as an informant" (16).

* * * * * * *

Mr. Barber testified:

"Q. Now, do you know Harold McCarthy?

"A. Yes, sir.

"Q. Did you know of his *employment* as informant by Mr. Mitchell and Mr. Boult?

"A. I had heard of it" (198).

* * * * * * *

"Q. You didn't advise anybody of the *employment of Harry McCarthy?*

"A. No, sir" (199).

* * * * * * *

"Q. You didn't know anything about the facts that McCarthy had been *employed* prior to David's death?

"A. Oh, yes; I knew he had been *employed* prior to David's death but I didn't have anything to do with it and I wasn't in on the matter at all.
"Q. How did you learn of his *employment?*
"A. I think from Mr. Boult or Mitchell, I forgot which" (200).

* * * * * * *

"Q. Did you know of any other thieves or robbers that were *employed* as snitches at the time of Mr. David's death?
"A. Well, there is generally a great many of those character of people *employed by different railroads,* as you don't employ a preacher to catch a thief" (201).

* * * * * * *

Mr. Boult's statement that they couldn't very well give McCarthy instructions about furnishing them information and what use he was to make of the information is not to be taken seriously because Boult makes the same statement as to instructions given to David and other train riders. He testified:

"Q. Where would they ride?
"A. That was left to their judgment, we couldn't just tell them where to ride" (35).

The substance of Boult's testimony in each case was that petitioner was hiring all these men for their judgment as to how to act under various circumstances, as much as for their services otherwise, which was not a criterion of their relationship with petitioner as being an employee or otherwise.

The court's attention is further called to the fact that petitioner is quite forgetful in its brief in this court of its present contention that McCarthy was an independent contractor and not an employee. Petitioner states: "That his sole purpose in so *employing McCarthy*" (B. 10); "that he did not advise other special agents, or train riders or any one of *the employment of McCarthy;* that *this employment* was kept secret; that it was not calculated to come to the knowledge of any of the company's employees outside of the *heads who employed him*" (B. 22). Also "he had nothing to do with *the employment of McCarthy*" (B. 23).

Petitioner states on page 36 of its brief:

> "Petitioner did not by the arrangement clothe McCarthy with any power or authority in its behalf to perform any duty which it owed to the public."

This statement of petitioner appears to be wholly without warrant in view of the fact that the testimony clearly shows that petitioner employed McCarthy for the purpose of ascertaining the operations of this gang of train robbers and reporting when and where they were to make depredations upon petitioner's trains, to the end that they might be trapped and caught and brought to justice, thereby putting an end to such depredations upon the property of petitioner and the property of shippers using petitioner's lines for the transportation of goods. Moreover, McCarthy was employed to furnish information as to the fences

or repositories for disposing of this property so that the property might be recovered and the robbers convicted and their gang broken up. In short, McCarthy was attempting to do under cover what David and other train riders of petitioner were doing openly, and they all worked with a common purpose of guarding, preserving and protecting the property of petitioner, and the public making use of petitioner's lines for transportation of goods. McCarthy was therefore performing a service which petitioner owed to its stockholders and creditors and to the public generally, and in every sense of the word was an employee. It was held by this court in *Baltimore & Ohio R. R.* v. *Burtch,* 263 U. S. 540, 44 Sup. Ct. Rep. 165, that a consignee of an interstate shipment of an agricultural implement, who assisted in unloading said agricultural implement at the instance of a railway employee was thereby rendered an employee of the railroad company and was entitled to recover under the Federal Employers' Liability Act for an injury which he sustained in assisting to unload the implement.

We believe that from the character of the testimony and the duties performed by McCarthy that his employment by the month at a specified wage clearly made him an employee of petitioner, even if petitioner had not tried the case on the theory that he was its employee.

Conclusion.

It is respectfully submitted that the judgment below was for the right party; that the Supreme Court of Missouri in its opinion herein has in no way departed from the rules of law long recognized and applied by this court, but, on the contrary, its decision here is entirely consistent and in accord with those rules of law, and that its judgment herein should be affirmed.

Respectfully submitted,

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APPENDIX

ARGUMENT

(Brief Before Supreme Court of Missouri.)

I.

The defendant, through its agent and employe, McCarthy, actually knew for twelve hours before the robbery that it would occur at the time and place it did, and it owed David the primary and non-delegable duty of warning him of this unusual and increased danger, and by not warning David, it not only failed in the fundamental duty so to warn, but also thereby rendered the place in which David was working unsafe. Having failed in its duty, defendant is liable for David's death resulting from such breach.

This is an action under that part of the Federal Employers' Liability Act which authorizes recovery for injury or death "resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier" (Sec. 51, Title 28, U. S. C.). No question is raised by defendant in regard to the nature of this action or the fact that David was engaged in interstate commerce at the time of his death (9).

The general rules applicable here are stated as follows:

> "If the master has knowledge that the particular employment is from extraneous causes hazardous or dangerous to a degree beyond what it fairly imports or is understood by the servant

to be, he is bound to inform him of the fact, and if he fails to do so, he is liable for such damages as the servant may sustain by reason of such causes" (39 C. J. 507).

"If the employer has actual knowledge of the danger, it is his duty to warn the servant thereof where the latter cannot, by the exercise of ordinary care, have discovered it" (*id.* 491).

"The duty of warning and instructing a servant is the primary duty of the master and the delegation of such duty to another servant, whether higher or lower in the scale of employment than the one exposed to danger, cannot relieve him of the responsibility imposed upon him by law, and nothing short of actual notice of danger to the workman who is to encounter it, will satisfy the requirement of the law; this rule applies with full force and vigor as to warning a young or inexperienced servant, *or warning a servant in regard to a new or increased danger, or to abnormal or extraordinary risks*" (*id.* 490).

"It is one of the legal duties of the master to give his servant warning of any extraneous and *unusual* danger to which he may be subjected; and if the master fails to use ordinary care to do so, and the servant is injured, the master is liable *because the injury did not flow from any risk assumed by the servant, but from the personal negligence of the master.* Nor can the master avoid liability by making it the duty of an agent to give such warning, and then, if it is not given, say that the negligence was that of a fellow servant. In such cases the maxim *qui facit per alium facit per se* applies as between the master and the servant entitled to the warning; and the servant or agent appointed to give the warning, no matter what his grade or rank in the general service of the master, becomes, for such purpose, the *alter ego* of the master. His act is the master's act;

his failure, the master's failure." 7 *Am. & Eng. Enc. of Law,* (2d Ed.) 417, and cases cited.

In the case of *Dixon* v. *Construction Co.,* (Div. 2, 1927), 318 Mo. 50, 298 S. W. 827, this court succinctly announced the legal principles applicable to this case, in this language:

> "The duty to exercise ordinary care to furnish the servant a reasonably safe place in which to work is the primary and non-delegable duty of the master. This duty has been imposed upon the master for the protection of the servant, who has a right to rely upon its performance. The master must from time to time inspect the place of work to see that it remains in a reasonably safe condition and to so maintain it. However, if the servant knew or by the exercise of ordinary care could have known that the danger or defect was obvious, open, apparent, imminent and hazardous he could not rely upon the rule. *And that the place of work is of unusual danger, does not affect the operation of this rule, for the servant may assume that it is as safe as the master can make it by the use of ordinary care and diligence, and that the master will not expose him to hidden or concealed dangers, without warning, discovered or discoverable by the use of ordinary care* (39 C. J. 827)."

The application of these familiar rules to situations where the master knew, actually or constructively of the existence of an imminent danger from intended felonious and violent acts of third parties are rare. Where, however, the courts have had occasion to pass on such situations, they have uniformly and without qualification, sustained liability for the injurious results which followed when the master, know-

ing that violence might reasonably be anticipated, failed to warn his servant thereof.

The leading case in this country on this subject is that of *Baxter* v. *Roberts,* 44 Calif. 187, 13 Am. Rep. 160. In that case, the defendant, Roberts, was having trouble with a neighboring lot owner over a fence. He employed the plaintiff, Baxter, a carpenter, to go upon the premises to do some work on the fence. He knew, but failed to tell Baxter, that any interference with the fence might be resisted by force. Baxter proceeded with the work, and was shot in the shoulder. The case was submitted to the jury upon substantially the same theory as that under which this case was submitted, and a judgment for the plaintiff was affirmed, the court saying:

> "That one contracting to perform labor or render service thereby takes upon himself such risks, and only such as are necessarily and usually incident to the employment, is well settled. Nor is there any doubt that if the employer have knowledge or information showing that the particular employment is from extraneous causes known to him hazardous or dangerous to a degree beyond that which it fairly imports or is understood by the employee to be, he is bound to inform the latter of the fact, or put him in possession of such information; these general principles of law are elementary and firmly established. They are usually applied to cases in which the employee has sustained injury by reason of some defect or unsoundness in the machinery or materials unknown to him about which he is employed to perform labor, and of which the employer knew or might have known in the exercise of ordinary care and vigilance on his part. The general principle which

forbids the employer to expose the employee to unusual risks in the course of his employment, and to conceal from him the fact of such danger, is not affected by the fact that the danger known to the employer arose from the tortious or felonious purposes or designs of third persons acting in hostility to the interests of the employer, and through agencies beyond his control. The employee is as clearly entitled to information of such known danger of that character as of any other the existence of which is known to the employer. The employer, if he knew or was informed of a threatened danger of that character, was bound to communicate the information to his employee about to be exposed to it in the course of his employment and in ignorance of its existence. The nature or character of the agency or means through which the danger of injury to the employee is to be apprehended can make no difference in the rule, for *the employee is entitled, in all cases, to such information upon the subject as the employer may possess, and this with a view to enable him to determine for himself if, at the proffered compensation, he be willing to assume the risk and incur the hazard of the business;* and if the employer have such information or knowledge and withhold it from the employee, and the latter afterward be injured in consequence thereof, the employer is liable to him in damages therefor."

In the case of *Holshouser* v. *Denver Gas & Electric Company,* 18 Colo. App. 431, 72 Pac. 289, the defendant had a strike on its hands in which the strikers were very aggressive, and threatened violence to those employed to take their positions. Plaintiff was employed as a stoker, and claimed not to be aware of the existence of the strike or of the angry temper of the defendant's employees. He worked for some eighteen

days when he was fired upon by some of the strikers, shot and disabled. A judgment sustaining a demurrer to the petition was reversed. In the opinion, the court commented on the case of *Perry* v. *Marsh,* 25 Ala. 659, where, the opinion states, it is said that:

> "If one employs a workman in a service which is apparently safe, but which becomes hazardous from causes disconnected with the service, which are not discoverable by the exercise of ordinary prudence, *he is bound by the strongest principles of morality and good faith to disclose the danger, if known to him; and the failure to make such disclosure would be a breach of duty for which the employer would be held responsible if, while engaged in the work, the workman sustained an injury.* This rule has been applied to a variety of facts; and, so far as our research has extended, it is uniformly held that in inducting employee into an employment which involves exposure to some invisible danger, no matter what the cause or nature of the peril may be, the employer, to escape responsibility, must impart to the employee his own knowledge of the situation" (citing cases).

The court then likens this situation to those in which the employee is exposed to some harmful and hazardous property inherent in the material with which he works, known to the master and unknown to him, and by which he is injured (see *Mooney* v. *Monark Oil & Refining Co.,* (Div. 1, 1927) 317 Mo. 1255, 298 S. W. 69).

In the *Holshouser* case, an attempt was made to distinguish it from *Baxter* v. *Roberts,* upon the theory that the shooting in the *Baxter* case occurred upon an invasion of the premises of another, while in the former

case the attack occurred upon the defendants' own premises and the assault was delayed for some time. The court commented thus on this theory:

> "We do not conceive this difference to be important. It strikes us that the degree of danger to be apprehended from exasperated men is not safely measurable by the cause of the exasperation. The destructiveness of firearms in the hands of persons determined to use them is the same, whatever the grievance or fancied grievance may be by which the murderous disposition is excited. *The controlling feature of both cases is that the employer knowingly exposed the employe to personal danger, and concealed the danger from him.*"

The case of *McCalman* v. *Ill. Central R. R. Co.*, (C. C. A. 6th C. 1914) 215 Fed. 465; is another strike case. Judgment for defendants was reversed and the case remanded. McCalman was a railway guard during a strike. A restraining order had been granted by a Federal Court to prevent interference with the movement of interstate commerce. For this reason a force of deputy United States marshals was operating in the same locality as was the plaintiff. The officer in charge of the railroad guards was apprehensive of violence during the night at the Horn Lake Road crossing, but thought that he and his guards could take care of the situation. He, with McCalman and another guard, went to the crossing, and joined some other guards who were there. The officer remained a couple of hours, ordered the guards to remain there until midnight and left. About ten o'clock the Special

Agent's Department was warned by telephone that trouble was brewing, and a call was put in for deputy marshals. Several were started from Memphis on a switch engine. When this engine arrived at Horn Lake crossing, the railroad guards mistook the deputy marshals on the engine for strikers, and the deputy marshals mistook the guards for strikers. Both sides opened fire, and McCalman was hurt. Circuit Judge Warrington states the rules applicable to that situation in this language with citations of cases which are here omitted:

> "It is a general rule as respects any hazardous occupation that the master shall inform his servants of all perils to which they will be exposed, *which are or should reasonably be known to him,* except such as are obvious to the servants or through the exercise of ordinary care on their part may be foreseen and in either event injury therefrom reasonably avoided" (citing cases).
>
> "And the duty so imposed upon the master is of a primary character and is therefore non-delegable."

Judge Warrington further stated that:

> "The chief danger rationally to be apprehended lurked in the telephone message, 'There was trouble at Nonconnah,' and the deputies approached the crossing with that belief. The nature of the danger, if under all the circumstances it was one reasonably to be anticipated, did not lessen defendant's duty to McCalman; for *knowledge of these new conditions would have enabled him to decide whether to remain at the crossing or discontinue his service.*"

In the case of *Telephone Company* v. *St. Clair*, (C. C. A. 2nd C. 1909) 168 Fed. 645, a lineman was *electrocuted when he came in contact with some live wires,* which he did not, but his employer did, know were carrying current. The court said:

> "Well settled principles of law determine the conclusion. It is the duty of the master to use reasonable care in securing the employe a reasonably safe place to work, *and to be reasonably careful in warning the servant of any special and particular dangers incident to some particular locality about which the master is advised or should be advised, if he has been reasonably careful;* that precise definition of the word 'reasonable,' varying, of course, with the circumstances of each particular case."

Or as succinctly defined by the court in *Ry.* v. *Hall*, 243 Fed. 82:

> "The employer's duty requires information to his employee of all perils which should be reasonably known to the employer, *and of any change which introduces a new element of danger.*"

The application of these plain "principles of morality and good faith" seems almost unnecessary. In large measure they are self applying and need little more than a complete statement of the facts to compel the conclusion that the defendant's liability in this case is clear and unavoidable.

Here was a change which certainly introduced a new element of danger, the definite planning of a robbery at a predetermined time and place. The court used the word "imminent" in the Dixon case, and it

fully describes the change, for common sense demonstrates the difference between dangers which are imminent and contingent. It was "a special and particular danger incident to a particular locality about which the master was advised." And, in the McCalman and Baxter cases, the reason given why the employee is entitled to such information as the employer has of new conditions affecting his safety is to enable the employee to decide whether to remain at his post or discontinue the service. Elsewhere in this brief, the events leading up to Mr. David's death as shown by this record have been reconstructed to show that in the performance of his regular duties he was shot from ambush without a chance to defend himself. Under the circumstances shown in evidence it would have been a simple and easy matter for him to have avoided this, had he known when the train pulled onto the siding at Leavenworth that desperate men were in waiting.

What this man was deprived of by McCarthy's failure to report was his elemental right to protect his life with the means at hand. That he would have exercised that right with ordinary care and prudence in the light of all the attending circumstances the law presumes. And he who denies him that right takes on himself the responsibility for the consequences which follow. The defendant suggests that there might have been a quarrel, an altercation, a provocation. But the court, in the Holzhauser case, says that "it strikes us that the degree of danger to be apprehended from exasperated men is not safely measurable by the cause

of the exasperation." And in the Lowrey case, cited by the defendant (Br. p. 26) it is said that "it should be naturally expected that a thief breaking into a car to steal, usually and ordinarily will resort to violence to prevent detection and detention or arrest."

If there was an altercation or provocation, Mr. David had a right to know the character of the man with whom he was dealing if the defendant knew it. And he had a right to avoid, if he chose, the "thief breaking into a car to steal" if the defendant knew he was a thief. He was deprived of this right and he was killed.

It comes with poor grace, it seems to us, for the defendant to say now that Mr. David's "unfortunate death" did not result "in whole or in part from the negligence" of McCarthy in failing to report so that it might have warned him in time to have given him an opportunity to protect himself.

Furthermore, it was the defendant's duty to Mr. David to exercise ordinary care to see that the railroad yards in Leavenworth where this train stopped constituted, even under these unusual circumstances, a reasonably safe place for him to examine the seals on the car doors and see that everything about the train was all right. This was a duty which the law imposed upon the defendant for Mr. David's protection and he had a right to rely upon its proper and reasonable performance.

It would have been a simple matter in this instance to have accomplished all the rule requires and expects, had the information, which McCarthy carried

with him for twelve hours before the tragedy occurred, been transmitted through the day-and-night telephone service which those directly responsible for Mr. David's protection had carefully arranged. When at five o'clock one evening, a short time before, McCarthy informed Mr. Boult of an intended attack on an undesignated train at Kenneth Tank, Kansas, Mr. Boult gathered together five armed men from the company's force and covered the point all night and warned all train riders who passed there (43). When news of Mr. David's death reach Kansas City, four special agents in the company's service were quickly collected and rushed to Leavenworth, by automobile (48). It is not a matter of speculation or conjecture, but a conclusion based upon common knowledge and experience to say that if Mr. Boult had had as much information on this Leavenworth affair as he had on the one at Kenneth Tank, as late as the time the train left Kansas City at ten o'clock, or even later, with his own force which could have reached the scene in an hour or two, and that of the police and peace officers of Leavenworth and Leavenworth County, they could and would have mobilized a veritable army and concentrated it at the time and the place where the gang had agreed this train was to be boarded. Had they done so, and the exercise of ordinary care for the protection of the train crew would have dictated it even if their own desire to do their duty had not—this bandit car would not have waited quietly for an hour and a half on a little creek bridge near an old

sugar refinery in the southeastern section of Leavenworth about a half a block from the Missouri Pacific tracks (126). Either the officers would have intercepted the gang as Mr. Mitchell said they would do upon receiving such information (20) or the bandits would have found the place "too hot" and abandoned the venture (see Mrs. Riley, 169).

This duty to provide security is said to be nondelegable. As between Mr. David and the defendant, in connection with McCarthy, the maxim *qui facit per alium facit per se* applied and by careful selection and well laid plans, McCarthy became the *alter ego* of the Chief Special Agent of the defendant and as close to the service "day and night" as the nearest telephone. His act was the defendant's act; his failure the defendant's failure.

It can not be said either that this resort to the ancient police device of espionage was altogether gratuitous so far as Mr. David was concerned or confined in its object and purpose merely to the apprehension and conviction of these persistent criminals. Under circumstances where the hazard is mechanical, the master is in duty bound to inspect the place from time to time to see that it is reasonably safe and so to maintain it. The character of the inspection must of necessity vary with the situation to be inspected and be directly related to the anticipated danger. The anticipated danger here was this organized gang of box car robbers, who were known to be utterly indifferent, to taking human life in furthering their ends. The propriety of investigating the gang's

activities and attempting to learn in advance where next it would strike was as plainly indicated under these circumstances as the necessity for constant inspection of the safety devices on a railroad engine. The employment of a stool-pigeon in the fulfilment of this salutary obligation of the employer may seem to be (and so far as we can find in the decisions and books it is) an unusual and novel procedure, yet the record discloses and common knowledge informs us that it is by no means an uncommon expedient in railroad and general police service (see Barber, 199). Fundamentally there is no difference between an informant and an inspector, and certainly the fact that the Chief Special Agent and his far flung organization knew who made up this gang, knew their haunts and habits, and knew the potentialities existing in their activities for injury and death to the operating personnel on its trains, would suggest, if it would not absolutely demand, within the rule of reason and ordinary care, that at all times it and its members be under some form of observation. The means of execution may have been novel, but the object and end of the duty were the same here as in the usual case calling for inspection.

The defendant contends that the employment of McCarthy was a voluntary act of the company, not known by David or contemplated by him in accepting the employment, so that if it proved ineffective, the failure cannot be made the basis of liability, and defendant cites the case of *St. Louis & San Francisco Ry. Co.* v. *Mills*, 271 U. S. 344, 46 Sup. Ct. Rep. 520.

The distinction between the Mills case and this case accentuates rather than minimizes the defendant's responsibility for the negligence of its secret agent, McCarthy. In the Mills case plaintiff was a car inspector during the strike in 1922, and while returning from work to his home on a street car, in company with a deputy sheriff employed by the company as a guard he was shot to death by strikers. *Mr. Justice* Stone included these pertinent and distinguishing facts in the opinion:

> "The undisputed evidence is that the shooting was done by one or more of three men standing on the rear platform of the car. They had come there after decedent and his companion had seated themselves in the car. *Without warning,* they fired a volley into the car and fled. Decedent and his guard were armed, *but had no opportunity to defend themselves.*"

There is a vast difference between the duty which an employer owes to an employe when the latter is working in line of his duty and when he is not. As *Mr. Justice* Stone points out, there was no common law duty on the part of the company to guard the strikebreakers while not in the employer's service or on his premises, and hence the protection afforded was purely a matter of contract.

Furthermore, there is no intimation in the *Mills* case that the company knew or had any more than a general reason to believe that decedent and his guard would be attacked on that particular car and at that particular time. On the contrary, they were fired upon without warning. Suppose the evidence had

shown that the company actually knew, by any means or agency whatsoever, that three men would get on the rear platform of that car after decedent and his guard had seated themselves, and without warning would fire a volley into the car, and, so knowing, had allowed the decedent and his single guard to submit themselves without warning, to this murderous assault, is it conceivable that by its decision the Supreme Court of the United States would have denied plaintiff's recovery?

But that still is not this case: Suppose the company had known, by any means or agency whatever, that this murderous assault would be made at a certain time and place, while the decedent was in the performance of his duty at the place of work to which he had been ordered by the defendant, and it had failed to warn him or take any steps whatsoever for his protection, is it possible that the Supreme Court of the United States would have denied liability because warning and external protection were only voluntary and not required by the law? Manifestly not! That court predicated its decision in the Mills case upon the sound premise that the company owed Mills no duty to see him safely home. Here the company owed Mr. David the elementary duty, taken from the very heart of the common law, to exercise ordinary care to see that the place of work into which it ordered him was reasonably safe, and that he was warned of perils known to it and not known to him.

The two cases are further distinguishable in this way: The means adopted in the Mills case proved

inadequate for the purpose—that is of effectively guarding the workmen, and the court held that mere inadequacy of gratuitous means could not constitute negligence. The means in this case were amply adequate. McCarthy completely fulfilled his mission by procuring the very information which Mr. Mitchell sent him to get. The failure of the means to accomplish the complete protection of Mr. David's life, was not due to any inadequacy or want of power or capacity, but entirely to the negligence of McCarthy, the agent. It was not his inadequacy, but this negligence in his failure to fulfill the definite and specific instructions given him by Mr. Mitchell and Mr. Boult that resulted in Mr. David's death.

II.

David did not assume the risk of the attack by the robbers as one of the usual and ordinary hazards of his employment, for the reason that this was an unusual and imminent risk existing at the time David was killed, known to the defendant through its employe McCarthy, and unknown to David, and defendant is liable for the negligent failure of McCarthy to report the information so that it might be passed on to David.

It cannot be said that this was one of the ordinary risks of the work, so that Mr. David's dependents must absorb the burden of their loss as part of the bargain made at the hiring. Under the test in the *Dixon* case the master is relieved of his duty and the burden is assumed by the servant when the servant knows or by the exercise of ordinary care could know that the danger "was obvious, open, apparent, *imminent* and hazardous."

Mr. David's position was a difficult one. He was selected by Mr. Barber as a man of "good judgment." Whenever the train stopped it was his duty in the dark to examine the seals on the car doors and see that they were intact, and that the train was all right. He came in contact with the train crew necessarily. He also frequently encountered tramps and other innocuous trespassers whose presence, though undesired perhaps, carried with it no threat of violence (184). Obviously it would be somewhat difficult to discriminate readily enough to insure protection in case of a sudden attack between those who deserved a quick shooting and those who did not. This was a circumstance which increased rather than lessened Mr. David's peril.

The defendant would have the court believe that he was hired to do or die without question and to shoot it out with the robbers whenever he came upon them. The testimony does not bear this out, and common sense suggests that the chief special agent did not expect a train rider singlehanded to do so Quixotic a thing as attempt to drive off a concerted attack of a dozen armed and determined desperadoes who would shoot on sight or that he "would fight them until he died," unless necessary for his own protection. Quite the contrary.

Mr. Boult testified that the train riders had no instruction, one way or another, about going armed and if they had firearms they provided them themselves, and that by all means they were not to get hurt if they could prevent it. Mr. Barber, who hired

him, said that he told Mr. David that he had to be very careful. The sergeant told him to watch his step.

Plaintiff is not minimizing the fact that Mr. David's job was a perilous one, but the peril, at the time he was killed was not and could not have been known by him, as the circumstances clearly show, to have been imminent. It was everything else but "obvious, open and apparent." So far as he knew he was exposed to no more than the possibility that he might, at some time and place, meet these bandits, who had been operating at irregular times and at widely scattered points along the system. The policeman on his beat, the sheriff in his county and the law's officers generally are similarly exposed to hazards not ordinarily assumed by persons in other walks of life. But the chances are much greater that they will never meet with violence than that they will suddenly be shot down without a chance for defending themselves. In the six weeks or more that David had been engaged as a train rider, the record shows that only once had his train been attacked and at that time, he was not on it. Indeed, the chances were very much in favor of the possibility that the train would never be held up, and certainly he had no more reason than Mr. Boult did (57), to believe that on that particular night at that particular time the gang would bring its deadly work home to him.

The defense stresses the fact in this connection that when Mr. David left Kansas City and at the time he was killed he was armed with a revolver and a sawed off shotgun. But they studiously avoided show-

ing whether at the time they were needed these arms were at the "ready" or "carry" positions. So far as it is necessary to do so here it is not difficult to reconstruct the circumstances leading up to the killing without resorting to testimony given by the man, who, the defendant admits, killed Mr. David, on the trial where he was convicted and sentenced to life imprisonment, testimony which was introduced in this trial for impeachment purposes only.

When the train stopped in Leavenworth on the siding, Mr. David was riding the engine, and Mr. Dougherty, the conductor, and Mr. Boyd, the other train rider, were in the caboose. These two men proceeded forward between the train and the main line track which would be on the side away from the right-of-way. Mr. David when he was killed, about ten minutes after the train stopped, was between twenty and twenty-five car lengths from the engine, proceeding back along the train, presumably inspecting it. It is significant that Mr. Dougherty, who was walking toward Mr. David and was only four or five car lengths away did not see him shot and saw no flashes. In other words, his attention had not been attracted to Mr. David by sight or sound and the shots did not come from the ground or the top of the train where they would have been seen. Mr. David was shot from above into the chest and was dead when they reached him. Gladsen and McCarthy had boarded the train before it stopped from the road on the right-of-way side. That they were careful not to attract attention was to be expected. Gladsen perched upon

the drawbar or sills between two of the cars, covered the exposed area along the train with his gun and fired two quick shots when Mr. David came into view. The gang had done exactly what the special agents had predicted it would do. It had shot on sight—indeed without sight and from ambush. Of course, Mr. David was armed. He had a revolver and a sawed-off shotgun. But he might also have had a saw-toothed bayonet and a sack full of hand grenades for all the good any of them would have done him when, unmindful that death was at hand, he stepped past the end of that last car.

This leads to the decisive rule in this case as stated in the *Dixon* decision.

> "That the place of work is of unusual danger, does not affect the operation of this rule, for the servant may assume that it is as safe as the master can make it by the use of ordinary care and diligence, and that the master will not expose him to hidden or concealed dangers, *without warning*, discovered or discoverable by the use of ordinary care."

When Mr. David stepped into Gladsen's ambush, he did so on the assumption that the defendant had exercised ordinary care and diligence under even the unusual circumstances existing here to see to it that Gladsen was not there and with the assurance that the defendant would not knowingly expose him to this completely concealed deadly danger without warning. He could act as he had acted for six weeks, on the theory that since he had not been notified otherwise,

he knew just as much about his chances as the company did.

When the train stopped in the yards at Leavenworth that night and it became his routine duty to inspect it, Mr. David had the right under the law, as declared in the *Baxter* and *McCalman* cases, *supra*, to determine for himself, while he was yet in a place of safety, whether, for $135.00 a month, he was willing to face the risk and incur the hazard which was then known by the defendant then to exist, and meet Gladsen face to face. In making this decision, he did not have to quit his job and leave his employer in the emergency. Under his instructions and orders, he had the further right to adopt all of the means available to him to avoid getting hurt if he could prevent it. His superiors had instructed him to be very careful for himself and to watch his step, and he had the right to do that intelligently. In the exercise of that right, he was entitled to use his own judgment and act with such information about the danger he would encounter as the defendant could furnish him.

As the court said in the *Holshauser* case, the controlling feature of this case is that the defendant knowingly exposed Mr. David to personal danger, and concealed it from him. That which had been a general, contingent hazard of the service, unrelated to time and place, had become a specific certain peril of a fixed time and a predetermined place, which were, for twelve hours known to defendant's *alter ego* McCarthy and would have been known to Mr. David had Mc-

Carthy availed himself of his opportunities and reported as he was instructed and ordered to do.

However hazardous the occupation may be the risks necessarily fall into no more than four classes: (1) Those known by both parties; (2) those known by neither party; (3) those known by the servant and not by the master and (4) those known by the master and not known by the servant. It would be a complete perversion of the whole rationale of the doctrine of assumed risk to say that it applied in any case of the latter class.

> "Ultimately the question (of assumption of risk) becomes one of comparative knowledge; if an employee is in as good a position as his employer for ascertaining and understanding the situation, and equally well knows and appreciates the conditions, he cannot be allowed to complain for injuries sustained by working therein. • • • Conversely, it is held that assumption of risk does not cover those unseen and obscure dangers which cannot reasonably be discerned by an employee and which the employer properly may be held to know about (18 R. C. L. 685, 686).
>
> "Whenever the employer from the standpoint of knowledge is in a position superior or dominant to that of the employee, the latter may rely for his safety on the activity of the employer. One who employs others in a business or industry that is known to be dangerous is charged with care reasonably commensurate with the perils to which his employees may be exposed in the discharge of their duties, and he impliedly contracts with each employee that he will fulfill his obligation. The employee may rely upon the performance of his duty" (*id.* 690, 691).

In the case of *Chicago & Northwestern Railway Co.* v. *Bower*, 241 U. S. 470, 36 Sup. Ct. 624, the court said:

> "There was present, therefore, an extraordinary danger, not normally incident to plaintiff's employment; it was in its nature latent, and not obvious; and there is no evidence in the record that plaintiff had received any notice or warning of the increased hazard attributable to his employer's negligence. In short, while he knew there were certain dangers naturally incident to the use of tubular glasses upon the lubricator, there is nothing to show that he knew or had any ground to believe that his employer had been wanting in the exercise of proper care for his safety, or that because of such want of care the danger to him was greater than it ought to have been. Without this, he could not be held to have assumed the increased risk. *Gila Valley, G. & N. R. Co.* v. *Hall*, 232 U. S. 94, 101, 58 L. ed. 521, 524, 34 Sup. Ct. Rep. 229; *Seaboard Air Line R. Co.* v. *Horton*, 233 U. S. 492, 504, 58 L. ed. 1062, 1070, L. R. A. 1015C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834. Judgment affirmed."

And again in the case *Chicago, R. I. & P. Ry. Co.* v. *Ward*, 252 U. S. 18, 40 Sup. Ct. 275, the opinion succinctly states the position of that court on the matter of assumption of risk in this language:

> "As to the nature of the risk assumed by an employe in actions brought under the Employers' Liability Act, we took occasion to say in *Chesapeake & Ohio Railway Co.* v. *De Atley*, 241 U. S. 310, 315, 36 Sup. Ct. 564, 566 (60 L. Ed. 1016):
>
> > 'According to our decisions, the settled rule is, not that it is the duty of an employe to exercise care to discover extraordinary dan-

gers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employe may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them.'

The Federal Employers' Liability Act places a coemploye's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of assumption of risk. 241 U. S. 313, 36 Sup. Ct. 564, 60 L. Ed. 1016. See also *Chesapeake & Ohio R. Co.* v. *Proffitt*, 241 U. S. 402, 468, 36 Sup. Ct. 620, 60 L. Ed. 1102; *Erie Railway Co.* v. *Purucker*, 244 U. S. 320, 37 Sup. Ct. 629, 61 L. Ed. 1166."

(See also *Clift* v. *Railway Co.*, (Div. 2, 1928) 320 Mo. 791 l. c. 799).

When Mr. David arrived in Leavenworth the night he was killed, he had a right to assume that the defendant, through its chief special agent's department, whatever its ramifications may have been, had exercised proper care with respect to his safety. How they did this was a matter of indifference to him. The chief special agent might rely on his own detective force, on underworld tips, on public police departments or on stool pigeons. Until and unless he was notified to the contrary, Mr. David could rest on the assurance that while he may have been confronted with unknown perils, he was not being subjected to those known to his superiors. And he assumed those risks and only

those risks of which he and his employer were in equal ignorance. It was unfortunate that David's superiors did not know of this new peril. That circumstance was due directly to McCarthy's failure to do his duty and report as he was ordered to do upon obtaining the information that the gang would attempt to rob Mr. David's train at Leavenworth that night. Did Mr. David or the defendant assume the risk of McCarthy's neglect? Under the language of the court in the Ward case, Mr. David assumed that defendant had exercised proper care with respect to his safety until notified to the contrary. Hence, the defendant and not Mr. David assumed the risk of McCarthy's negligence.

III.

There was ample evidence that McCarthy had plenty of opportunity with safety to himself to communicate with defendant after the plans were made for this robbery.

But, the defendant contends, there was an absolute failure to prove that McCarthy had an opportunity "without uncovering himself" to his associates to communicate with Boult after the final plans were made to rob this particular train (Br. 32).

We know of no rule of law that would relieve defendant of the duty to warn David merely because McCarthy did not want to "uncover himself." The trial court properly submitted the issue to the jury on the theory that if McCarthy could have communicated his information "with safety to himself" then plaintiff should recover. But even on defendant's own theory

there was ample time for McCarthy to have communicated with Boult without "uncovering himself."

Both Mr. Mitchell and Mr. Boult testified that arrangements were made for McCarthy to get in touch with Mr. Boult by telephone at any time he might want to through the day or night (15, 16, 30, 39). And McCarthy had used the system (41). While in front of the court house in Kansas City, Kansas, during the noon hour McCarthy knew that it was agreed that the gang would go to Leavenworth that night and rob the merchandise train that reached there about one-thirty in the morning, the same train that had been robbed at the same place a number of times before (61, 62, 74, 64, 118, 126). During the afternoon the gang, including McCarthy, were about the court room as spectators (116, 117). When court adjourned they gathered at a rendezvous in Armourdale, a part of Kansas City, Kansas, and the personnel of the expedition was agreed upon. That was about six-thirty (64, 65, 168-170). They then went to a restaurant in Armourdale to eat supper and from there drove to the intersection of Seventh and Minnesota, in Kansas City, Kansas, which any Jackson County jury knows is the principal corner in that populous center (120-121). Here McCarthy left the two confederates with whom he had been riding, went alone to a drug store more than a block away and was separated from his associates seven or eight minutes (122). This is significant, not only to show a specific opportunity to report, but to show that McCarthy was under no suspicion, or restraint of any kind that would interfere

with his absenting himself from his associates long enough to make a local 'phone call. After that and for at least two hours, he went from place to place in Kansas City, Kansas, similarly to all intents and purposes free to do as he pleased and with every opportunity to make an occasion when he could report to Mr. Boult. The general information of a Jackson County jury would also encompass the fact that at no time from the time the plot was hatched at noon until the gang finally left Kansas City, Kansas, at ten o'clock, was he ever out of the direct telephone range of the central office serving greater Kansas City. He was not even embarrassed at any time with the necessity for putting in a long distance call. Certainly it was a fair inference for the jury to say that under these circumstances he had plenty of opportunity to communicate with Mr. Boult "with safety to himself" after he knew that the gang intended to make this particular train when and where it did. McCarthy might have denied it. But he did not appear at the trial.

IV.

Defendant's authorities are distinguishable and not in point.

Confronted though the defendant was under the instruction given by the trial court with the simple theory upon which this case was submitted to the jury, the defendant has nevertheless avoided any discussion or citation on the proposition that Mr. David was entitled to the benefit of any information

which the defendant or its servants had, and that the defendant is liable for failure to warn Mr. David of the imminent and impending danger at the time. Consistently, also, the cases which defendant cites are not cases in which there occurred this element of surprise to the workman, and want of warning.

In the case of *Thomas* v. *Missouri Pacific Ry. Co.*, 109 Mo. l. c. 200 (1891), there appear quotations from Thompson on Negligence and Sherman & Redfield on Negligence, stating the general rule with respect to the assumption of risk in occupations ordinarily and extraordinarily hazardous. The question arose in this case out of the relative rights and duties between switchmen and railroad companies in the handling of foreign cars, the case going back to those remote days before car coupling was standardized by national legislation.

The case of *Joyce* v. *Wooster*, (1885) 140 Mass. 345, 4 N. E. 565, was a sewer ditch case, likewise laying down the general rule that the servant assumes the extraordinary risks of an extraordinarily dangerous job when he fully knows about them.

The case of *Vestner* v. *Northern Calif. Power Co.*, (1910) 158 Cal. 284, 110 Pac. 918, is cited here as authority for the general rule of assumption of risk. This was an action under a California statute involving an injury to a workman when a tree fell with him in it. As we read the opinion, the decision against recovery in that case was predicated upon the fellow servant doctrine, and not upon the assumption of risk

doctrine. Under the Federal Employers' Liability Act, of course the fellow servant doctrine has nothing to do with this lawsuit.

The case of *Lowrey* v. *Atlanta Joint Terminals*, 145 Ga. 782, 89 So. 832, involved injuries to a railroad detective injured in the yard by thieves. There was in this case no evidence of any lack of parity between the knowledge of the detective and that of his employer. The court uses one sentence in the opinion to state a natural truth which was as binding upon the company here as it was binding upon Mr. David.

> "It should be naturally expected that a thief breaking into a car to steal, usually and ordinarily will resort to violence to prevent detection and detention or arrest."

Whatever may have been the specific reputation of the Gladsen gang, as it was known to the Special Agent Service of the Missouri Pacific, they could naturally expect thieves to resort to violence if accosted in their work. Hence, they could forsee the result that did follow when David, unsuspecting the character of the trespasser, came upon Gladsen.

Atlantic Coast Line v. *Southwell*, 272 U. S. 64, 48 Sup. Ct. 25, does not touch this case top, side or bottom, except that it was a death case under the Federal Employers' Liability Act. The death resulted in a personal altercation and was described in the syllabus as being wilful murder. Liability was predicated upon the theory that a general yard master, who was present, might have prevented it if he had forseen

the fatal consequence, which Mr. Justice Holmes said was unreasonable to expect of him under the circumstances. This is quite a different situation than that existing in the case at bar. At best the yard master was not more than an innocent bystander, who was unable to foresee that hot words between two men would result in the death of one of them. In the case at bar the *alter ego* of the defendant was a duly commissioned observer, duty bound to report, and quite conversant with the almost certain possibility that Mr. David, the train rider, and indeed all the members of the crew, would be exposed to violence if and when they encountered Gladsen's gang in the execution of a definitely planned robbery.

In *Manwell* v. *Donrst*, 178 Cal. 752, 174 Pac. 881, 1 A. L. R. 669, a man was killed during a strike of hop-pickers on a California ranch. He seems to have been a part of a sheriff's posse organized to preserve the peace during the strike. In affirming a judgment sustaining a demurrer to the petition, the California court held that there was no showing of negligence. The court distinguishes that case from the *McCalman*, *Baxter* and *Holshouser* cases cited above, on the theory that in each of those cases there was an element of concealment from the employee of facts relating to the perilous nature of the employment, due to special circumstances of which the employee was ignorant.

In a note at the end of this case, it will be observed that the editors were able to find only three strike cases in this country, the *Manwell*, *McCalman*

and *Holshouser* cases. In two out of those three cases recovery was allowed.

Feaster v. *Southern Pacific Ry. Co.*, (C. C. A. 4th C. 1926) 15 Fed. (2nd) 540, was a case involving the death of a deputy sheriff hired as a guard of railroad property during the strike in 1922. In some ways this case comes nearer being similar in its facts to the case at bar than any of the cases cited by the defendant. In the important and relevant particulars, however, the situation was precisely contrary to that which here exists. Very little was told of the decedent's murder. Apparently he was shot by strikers or their friends and sympathizers, but it was not known who had anything to do with it. Five men were indicted, but acquitted.

> "For all it appears he might have died as and when he did had the railway supplied a host of guards and armed them with every instrument of death which modern science is able to provide."

In the case at bar, Mr. David's murderers were known to the defendant before and after his death. Gladsen, who killed him, was sentenced to life (the maximum in Kansas) on the testimony of McCarthy who knew twelve hours before the death when and where the violence would occur. The defendant in this case did not prove or attempt to prove that at the time its force was not adequate to have intercepted, overpowered and incapacitated three known bandits bent on robbing the train at a particular time and a particular place. Certainly it would not have taken a host of

guards or any armament beyond the usual side-arms of an ordinary peace officer, to have prevented this unfortunate casualty.

The case of *St. Louis & San Francisco* v. *Mills*, has been heretofore commented upon. It is subject to the same distinction. The parties there were in equal ignorance of the impending calamity.

Conclusion.

The primary obligation of the company to warn Mr. David and give him the advantage of every bit of information it had with respect to the hazards he would encounter seems to us so obvious as not to allow of any doubt. The defense predicated upon the harsh doctrine of the assumption of risk seems to us entirely specious and in no way applicable under the facts here existing. We can see no difference between an informant, call him stool-pigeon, snitch or what-not, in his relation to the rest of the service, and particularly those individuals whose duty takes them out on the firing line of the service, and the car inspector and track walker in their relations to the operating personnel of the trains. McCarthy was the agent and employee of the defendant. The jury has found upon evidence fully justifying the finding that he was negligent and that Mr. David's death resulted therefrom. This is a literal fulfillment, therefore, of the statute enacted by Congress for the protection of Mr. David's dependents, fixing liability upon the defendant when an employee's death results in whole or in part from the negligence of its agents and employees. The

plaintiff, his widow, has recovered in a fair trial without prejudice to the defendant, and that recovery should be affirmed.

There is another unusual situation in this case. In no other case in our experience has an injury or death from negligence resulted in a direct pecuniary benefit to the defendant. In this case the company was concerned about its losses from the operations of the gang of thieves by whom Mr. David was killed. Predicating murder charges upon his death, the company was able, with the help of its informant, McCarthy (for which they rewarded him by interceding for his liberty after a conviction of robbing their freight cars had been affirmed by the Kansas Supreme Court) to put Gladsen away for life and Hayes and Loar for long stretches, and thus ridded itself of this menace and source of loss. Whatever may have been McCarthy's fidelity to the company in procuring these convictions, Mr. David's death at the hands of an assassin was the proximate and efficient cause of the complete eradication of the menace and loss. Hence, in a very real sense, Mr. David's death resulted in a direct pecuniary benefit to the Missouri Pacific. The question is: Shall the Missouri Pacific Railway Company or Sophia David pay for this extreme service?

Respectfully submitted,

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